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In The

Supreme Court of the United States

October Term, 1992

LARRY MOOREHOUSE,

Petitioner,

vs.

GRAND RIVER DAM AUTHORITY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

RESPONDENTS' STATEMENT OF THE CASE..... 1

A. Brief Statement of Facts..... 1

B. Misstatements of Fact in Petitioner's Brief ... 4

1. GRDA's lack of authority to set its own employment policy..... 4

2. GRDA did not have a policy or custom of giving job protection to unclassified employees..... 5

3. GRDA was not directed to implement pre-discharge due process procedures for unclassified employees as a result of *Cleveland Board of Education v. Loudermill*..... 5

4. The GRDA Board of Directors did not go into executive session to discuss the termination of Petitioner..... 6

5. The former general counsel did not tell the Board that Petitioner was entitled to a pre-termination hearing..... 7

6. Petitioner's promotion to an unclassified position..... 7

7. GRDA did not pay the claims of two other suspended employees..... 8

8. The State Commission did not find that the GRDA willfully violated the Oklahoma Personnel Act..... 8

9. The Magistrate did not find that the GRDA Board engaged in "illegal" conduct in the executive session..... 9

SUMMARY OF ARGUMENT..... 10

ARGUMENTS AND AUTHORITIES..... 11

TABLE OF CONTENTS – Continued

Page

I THERE IS NO BASIS FOR REVIEW OF PETITIONER'S LIBERTY INTEREST CLAIM 11

A. The Tenth Circuit Decision is Consistent with this Court's Holdings 12

B. Analysis of the Newspaper Articles 15

C. The Tenth Circuit's Reliance Upon *Melton v. Oklahoma City* 16

D. The Tenth Circuit Has Not Created a "Hiding Place" for Public Employers 17

II THERE IS NO REASON TO GRANT CERTIORARI ON PETITIONER'S REJECTED PROPERTY INTEREST CLAIM 20

A. The Question of Whether Petitioner had a Property Interest is a Question of State Law, and Not Appropriate for Certiorari 21

B. No Conflict Exists Between the Decision Below and Decisions of the Oklahoma Supreme Court or the Tenth Circuit 22

1. The *Driggins* Holding 22

2. *Driggins* is consistent with the Tenth Circuit Decision Below 23

3. GRDA's governing documents do not give Petitioner a property right to continued employment 24

4. Application of *Driggins* to Case at Bar .. 27

CONCLUSION AND REQUESTED RELIEF 29

TABLE OF AUTHORITIES

Page

CASES

Asbill v. Housing Authority of Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984) 26

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) ..... *passim*

Blanton v. Housing Authority of the City of Norman, 794 P.2d 412 (Okla. 1990) 26

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 15

Carnes v. Parker, 922 F.2d 1506 (10th Cir. 1991) 22

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 5, 6

Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) ..... *passim*

Driggins v. Oklahoma City, 954 F.2d 1511 (10th Cir. 1992); *cert. denied*, 113 S.Ct. 129 (1992) ..... *passim*

Dupree v. United Parcel Serv., Inc., 956 F.2d 219 (10th Cir. 1991) 22, 27

Graham v. City of Oklahoma City, 859 F.2d 142 (10th Cir. 1988) 23

Melton v. Oklahoma City, 928 F.2d 920 (10th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 296 (1991) ..... *passim*

Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 14

Perry v. Sindermann, 408 U.S. 593 (1972) 23, 28

Pitts v. Board of Education of U.S.D. 305, Salina, Ks., 869 F.2d 555 (10th Cir. 1989) 2

TABLE OF AUTHORITIES – Continued

Page

Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988) 2

State, ex. rel. Murphy v. Boudreau, 653 P.2d 531 (Okla. 1982) 26

Umholtz v. City of Tulsa, 565 P.2d 15 (Okla. 1977) 23

Wolf v. City of Fitchburg, 870 F.2d 1327 (7th Cir. 1989) 28, 29

STATUTES

42 U.S.C. § 1983 ..... 1, 4, 10

25 Okla. Stat., tit. § 307(E)(3) 19

74 Okla. Stat., tit. § 840.3(a) 4

74 Okla. Stat., tit. § 840.7 24

74 Okla. Stat., tit. § 840.8c 4

74 Okla. Stat., tit. § 840.8(16) 25

82 Okla. Stat., tit. § 864 25

State of Oklahoma Merit Rules for Employment 25

State of Oklahoma Merit System 25

RESPONDENTS' STATEMENT OF THE CASE

A. Brief Statement of Facts

This appeal arises from Petitioner's claims that his due process rights were allegedly violated pursuant to 42 U.S.C. § 1983 by the cessation of his employment with the Respondent, Grand River Dam Authority ("GRDA"), an agency of the State of Oklahoma. At all times during his employment at GRDA, Petitioner admittedly was an unclassified employee. Under the Oklahoma Merit System and Oklahoma Merit Rules for Employment, unclassified employees have no property right to continued future employment.

On December 2, 1987, the GRDA Board of Directors met in executive session to receive and discuss a report from Charles McLaughlin of the Oklahoma Attorney General's office regarding an investigation by the Oklahoma State Bureau of Investigation ("OSBI") into operating and purchasing practices at GRDA. (Aplt. App. at 80).

The report contained information on several GRDA employees, including allegations based upon statements of GRDA employees that Petitioner, while employed as a superintendent of GRDA, ordered the falsification of time sheets and overtime records, converted GRDA equipment and supplies to his personal and non-GRDA use, forced employees to do non-GRDA work on company time, and allowed employees to take GRDA property off GRDA premises for personal use and then destroyed the evidence thereof. After reviewing and discussing the OSBI report, the GRDA Board returned to regular session and adopted a resolution authorizing acting General Manager, Henry Neftzger, to take the action he deemed necessary. (Aplt. App. at 79). Significantly, no information from the

OSBI report was published by the GRDA during the regular session or thereafter.

On December 5, 1987, Neftzger suspended Petitioner and three other GRDA employees *with* pay. Petitioner was notified of his suspension on December 7, 1987, the day the suspension became effective. (Aplt. App. at 71). In response to media inquiries, Neftzger confirmed to the press that Petitioner and the three other employees had been suspended with pay as a result of the OSBI investigation of purchasing practices. (Aplt. App. at 73-75). Contrary to Petitioner's claims, however, neither the newspaper articles, nor Mr. Neftzger, stated that Petitioner was suspended in connection with a "criminal investigation".

In late January, Petitioner, while still suspended *with pay* from the GRDA, accepted a full time job with Empire Electrical District in Joplin, Missouri. (Aplee. Supp. App. at 132-133). Petitioner notified GRDA of his acceptance of such other employment in a letter from his attorney dated January 28, 1988. (Aplee. Supp. App. at 134). GRDA deemed Petitioner's actions to be an abandonment of his employment with GRDA and tendered all compensation due Petitioner on February 1, 1988. (Aplee. Supp. App. at 135-138).[1] Petitioner's claim that he was *constructively*

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[1] The undisputed fact that Petitioner was suspended *with pay* at all times until he accepted employment elsewhere is significant. Under Tenth Circuit holdings, a suspension *with pay* does not implicate property rights, *Pitts v. Board of Education of U.S.D. 305, Salina, Ks.*, 869 F.2d 555 (10th Cir. 1989), and should not create a sufficient entanglement to cause stigmatization or implicate a liberty interest because it is not a permanent exclusion from or protracted interruption of employment. *See Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384, 1397 (10th

discharged on December 7, 1987 and was terminated on January 31, 1988 "because of the OSBI investigation", is thus a misstatement of fact, since Petitioner was paid by GRDA until February 1, 1988 at which time he was deemed to have abandoned his employment with GRDA by taking another job.[2]

Approximately nine months later, Petitioner accepted employment with the City of Glendale, California, as a superintendent making more money than he did at GRDA.[3] (Aplee. Supp. App. at 139-140).

Petitioner's pleadings to the trial court raised four causes of action against GRDA, and against Henry Neftzger and the members of the GRDA Board of Directors in both their official and individual capacities. The

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Cir. 1988). Thus, Petitioner certainly wasn't entitled to any hearing prior to February 1, 1988.

Further, once Petitioner notified GRDA he had accepted other employment with an out-of-state employer and GRDA deemed him to have abandoned his employment, no hearing was required. GRDA's decision to remove Petitioner from the payroll was not a punitive act but a mere recognition that Petitioner was now working elsewhere. Surely Petitioner is not arguing that he had a property right to continue being paid for doing no work by GRDA, a public agency, when he was being paid by someone else to work elsewhere.

[2] Although the evidence shows that Petitioner abandoned his employment, GRDA has assumed for the remainder of this Response that Petitioner's job was terminated on February 1, 1988, since the question whether Petitioner was terminated or abandoned his employment is irrelevant to the issues before this Court.

[3] Petitioner's liberty interests had obviously not been violated since the fact that he obtained other employment proves he did not suffer a foreclosure of employment opportunities. *See*, Notes, 2 and 10, *infra*.

first and second causes of action alleged GRDA violated Petitioner's procedural and substantive due process rights under 42 U.S.C. § 1983. Petitioner's remaining two causes of action were Oklahoma state law claims for defamation and intentional infliction of emotional distress. The trial court granted summary judgment in favor of Respondents, dismissed the civil rights claims on their merits, and ordered the two state law claims be dismissed for lack of jurisdiction. The United States Court of Appeals for the Tenth Circuit affirmed the trial court's order in its entirety.

B. Misstatements of Fact in Petitioner's Brief.

In addition to those misstatements of fact specifically discussed elsewhere in this Response, Respondents note the following misstatements. Any dispute over these alleged misstatements does not affect and is not material to the factors which determine whether certiorari should be granted. The misstatements are raised in order to satisfy Respondents' obligation pursuant to Rule 15.1 and preserve Respondents' challenge to the statements in the event certiorari is granted.

1. *GRDA's lack of authority to set its own employment policy.* GRDA does not have the power or authority to set its own policy for hiring and firing employees, as alleged in Petitioner's Brief. As an agency of the State of Oklahoma, GRDA was subject to the statutory framework of the Oklahoma Merit System and the related Merit Rules for Employment. *See*, Okla. Stat., tit. 74 §§ 840.3(a), 840.8c and Executive Order. (Aplt. Supp. App. at pp. 170-172). Moreover, GRDA, through its Bylaws and policy manual, specifically subjected itself to the Merit System and Merit Rules for Employment. *See*, discussion on pp. 24-27, *infra*.

2. *GRDA did not have a policy or custom of giving job protection to unclassified employees.* It is also a misstatement of fact that GRDA established a policy and custom of giving job protection to unclassified employees, such as Petitioner. The supposed evidentiary basis for Petitioner's claim is a series of affidavits in which the affiants purport to discuss GRDA employment "policy."[4] (Aplt. App. at 90-107, 114-115). The affidavits, taken in their best light, only demonstrate a "unilateral expectation" of future employment. They certainly do not demonstrate the "substantive restriction" on the employer's right to discharge employees required to establish a property right under Oklahoma law, as is discussed below. (*See*, Note 16, *infra*). Further, these affidavits are inundated with evidentiary defects, including lack of a proper foundation, an overwhelming reliance upon hearsay statements, and gross speculation which permeates the opinions given. The specific defects are too numerous to discuss herein, but the affidavits were in the record before both the trial court and Tenth Circuit. The Tenth Circuit examined all arguments the Petitioner advanced in support of his property right argument, including the affidavits, and found them to be "wholly without merit." (Petitioner's App., p. 5).

3. *GRDA was not directed to implement pre-discharge due process procedures for unclassified employees as a result of* ***Cleveland Board of Education v. Loudermill***. It is misleading for Petitioner to contend that GRDA was

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[4] Since the statements were made in the form of affidavits, Petitioner's statement that GRDA top managers, including a former personnel manager, "testified" about the alleged policy and custom is misleading.

informed by the State of Oklahoma two years before Petitioner's suspension that its unclassified workers may be entitled to due process before discharge. The source of this allegation was not a "directive" to GRDA as claimed by Petitioner, but actually a letter sent by the State of Oklahoma Office of Personnel Management ("OPM") to "All Appointing Authorities" in the state. (Aplt. App. at 59-60). The letter discusses this Court's holding in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). It is apparent from a review of the letter that it was designed to inform all Oklahoma state agencies of the need to review or develop pre-discharge administrative procedures for *classified* employees. The OPM stated that its review of the *Loudermill* decision was in its initial stages and then generally speculated that *some* unclassified employees *may* be affected. It did not identify any GRDA unclassified employees who might be affected, and certainly did not instruct the GRDA "to implement procedures to provide employees, including some unclassified employees, with notice and opportunity to respond prior to discharge" as contended by Petitioner.

4. *The GRDA Board of Directors did not go into executive session to discuss the termination of Petitioner.* It is a misstatement for Petitioner to claim the GRDA Board of Directors went into executive session to discuss the OSBI report and the "termination of the Petitioner." (Petitioner's Brief, p. 6). The executive session was convened to review the OSBI report and discuss personnel matters arising therefrom. (Aplt. App. at 80). Moreover, the Board, with the possible exception of one member, *did not know* before the session the identity of *any* of the individuals discussed in the report, much less that Petitioner was discussed, and *did not know* the gravity of the information

contained therein. Thus, the Board could not have gone into the executive session with the intent to discuss the termination of Petitioner. (Aplt. App. at 80). Further, although the Board discussed various personnel matters once the session began, the Board decided to allow Respondent Neftzger to take the action he deemed necessary. (Aplt. App. at 79). Ultimately, Neftzger's decision was to suspend Petitioner *with* pay, not to terminate him. (Aplt. App. at 71).

5. *The former general counsel did not tell the Board that Petitioner was entitled to a pre-termination hearing.* It is also misleading for Petitioner to contend that Bob Sullivan, former GRDA general counsel and then assistant general manager of administration, advised the Board that "unclassified employees, like the Petitioner, were entitled to a hearing where specific proof must be produced as to why he should be discharged." (Petitioner's Brief, p. 6). The statement attributed to Sullivan by Petitioner is taken out of context and unfairly paraphrased by Petitioner. Sullivan's statement to the Board was in reference to three other unclassified employees, not Petitioner. In his statement Sullivan correctly informed the Board that unclassified employees are not entitled to a pre-termination hearing by saying: "All of these people are unclassified employees, and they are not entitled to any of the protection under the Merit System." (Aplt. App. at 82).

6. *Petitioner's promotion to an unclassified position.* Petitioner's statement that he was made the *permanent* superintendent of the GRDA coal-fired plant in 1982 is also misleading. Since Petitioner had previously been the *acting* superintendent, the term "permanent" was used to indicate that other candidates were no longer being screened or considered for the position. Petitioner clearly

remained an at-will employee after such appointment as demonstrated by the personnel action form documenting such appointment, which described Petitioner's promotion as a "Permanent appointment to *unclassified* position." (Aplt. App. at 46, emphasis added).

7. *GRDA did not pay the claims of two other suspended employees.* Petitioner misstates that GRDA "paid the claims" of two other employees who were suspended with pay at the same time as Petitioner. GRDA reached a settlement of disputed claims with the two other employees. There is no evidence in the record that the settlements were paid because the other two individuals had property rights to future employment. Moreover, there was no admission by GRDA or finding by any tribunal that the other two individuals had any property rights to future employment.

8. *The State Commission did not find that the GRDA willfully violated the Oklahoma Personnel Act.* It is a misstatement of fact that the Office of Personnel Management ("OPM") concluded in 1990 that the GRDA was willfully violating the Oklahoma Personnel Act. The investigative report stated that *if* GRDA did not take corrective action of some items identified in the report within the specified time frame, *then it would appear* that there would be a willful violation. (Aplt. App. at 149.). There is no evidence in the record that such a conclusion was ever reached.

Further, the findings of the investigative report are irrelevant to the determination whether a writ of certiorari should be granted and irrelevant to the issues decided below. The investigative report makes no findings or recommendations regarding pre-termination or discharge procedures, or the granting of property rights

to unclassified employees. Respondents can only conclude that the unjustified discussion and mischaracterization of the OPM report in the Petition is an attempt to prejudice the Court against the GRDA.

9. *The Magistrate did not find that the GRDA Board engaged in "illegal" conduct in the executive session.* The Petitioner's statement that a United States Magistrate determined that the December 2, 1987 GRDA executive session was "illegally" convened is a misstatement of the Magistrate's ruling and is misleading. The Magistrate, faced with a discovery dispute, determined that the GRDA agenda for the December 2, 1987 Board meeting did not adequately and specifically describe the topics which were discussed in the executive session, since the agenda referred to a discussion of "possible litigation" resulting from the OSBI report and not "possible personnel action" resulting from the report. As a result, the Magistrate concluded that the executive session was improperly convened and not lawfully closed or conducted. The Magistrate did not impute an "illegal" intent or conduct to the Board or the Board members, but rather determined that the executive session transcript was not privileged. The word "illegal" does not appear in the Magistrate's Findings and Conclusions.

Petitioner's discussion and misleading reference to the Magistrate's Findings is suspect. Even if Petitioner's characterization of the Magistrate's Findings was accurate, there would be no reason to discuss it in the Petition. Whether an executive session was properly convened has no relevance to whether Petitioner had a property right to continued employment, whether GRDA published false and stigmatizing statements in connection with the "termination" of Petitioner's employment or

whether the Petition for Certiorari should be granted. The gratuitous, unnecessary and inaccurate reference to the Magistrate's report appears to be nothing more than mudslinging designed to prejudice this Court's sentiments against GRDA.

SUMMARY OF ARGUMENT

Petitioner raised no issue requiring the grant of certiorari by this Court. The Tenth Circuit correctly affirmed the trial court's summary judgment dismissing Petitioner's causes of action pursuant to 42 U.S.C. § 1983. No error was committed in dismissing Petitioner's property and liberty interest claims. More precisely, Petitioner has not, and cannot, point to any conflict between the Tenth Circuit's unpublished decision and any holding of this Court, any other circuit court of appeals, or the Supreme Court of Oklahoma. For this reason, the Petition for Certiorari should be denied.

There is no justification for a review of the Tenth Circuit's denial of Petitioner's liberty interest claim. The Tenth Circuit concluded that GRDA did not publish false or stigmatizing information in connection with Petitioner's alleged termination, did not publicly embrace or assert any false accusations against Petitioner, and did not publish any statement that was made with duplicity. (Petitioner's App. p. 5-6). Thus, the Tenth Circuit analysis was consistent with the guidelines established in this Court's holdings in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). Nevertheless, Petitioner attempts to manufacture a conflict between the Tenth Circuit and this Court's holdings in liberty interest cases by mischaracterizing the Tenth Circuit's decision,

ignoring material portions of the Tenth Circuit order, misstating the record, and ignoring the material and applicable holding of this Court in *Codd v. Velger* that the *employer must create* a false impression before a liberty interest is violated. *Codd v. Velger*, 429 U.S. at 628. Since, in reality, there is no conflict between the Tenth Circuit's decision and this Court's holdings, there is no basis for review of Petitioner's liberty interest claim.

Similarly, there is no reason for this Court to consider Petitioner's property right claim. The Tenth Circuit properly examined Petitioner's claim to a property right by applying well-established Oklahoma law, as required by *Bishop v. Wood*, 426 U.S. at 344-345. The Tenth Circuit correctly concluded that Petitioner's claim was "wholly without merit." (Petitioner's App. 5). Because this analysis is one of state law, the final arbiter of which is not this Court but the Oklahoma Supreme Court, and because the Tenth Circuit's analysis is consistent with Oklahoma law, there is no justification for review of the Tenth Circuit's unpublished decision.

ARGUMENTS AND AUTHORITIES

I

THERE IS NO BASIS FOR REVIEW OF PETITIONER'S LIBERTY INTEREST CLAIM

The Petitioner's argument that this Court should review the Tenth Circuit's denial of his liberty interest claim is meritless because Petitioner has misstated and mischaracterized the Tenth Circuit decision in an apparent attempt to create a conflict with decisions from this Court. Petitioner also fails to discuss a material holding of the Tenth Circuit which clearly negates Petitioner's

interpretation of the Tenth Circuit opinion and the argument that such opinion is in conflict with this Court's holdings. When the Tenth Circuit opinion is fully read and properly considered, there is *no* conflict between the Tenth Circuit and this Court, and no basis for the grant of certiorari.[5]

A. The Tenth Circuit Decision is Consistent with this Court's Holdings

Significantly, Petitioner acknowledges this Court's holdings that a stigmatizing statement must be *disclosed publicly* in order to violate a liberty interest, *Bishop v. Wood*, 426 U.S. at 348 (1976), and that the stigmatizing statement must be *false*. *Codd v. Velger*, 429 U.S. at 627 (1977).[6] The Tenth Circuit clearly considered and properly applied these decisions in its analysis and holding in this case:

> Mr. Moorehouse fails to recognize that defendants made no public statement accusing him of

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[5] Petitioner does not contend that there is a split among the circuit courts of appeal regarding the liberty interest question decided by the Tenth Circuit in this case, or that the Tenth Circuit or the trial court departed from the accepted and usual course of judicial proceedings in a manner which calls for the exercise of this Court's supervision.

[6] Petitioner's acknowledgement of the falsity requirement eliminates the need to discuss Question Presented No. 2, as set forth in Petitioner's Brief at page (i). Since proof of falsity is required by *Codd v. Velger*, it is unnecessary to decide whether a stigmatizing statement alone, without regard to its "truth or falsity," violates a liberty interest. Moreover, this question does not appear to be discussed in Petitioner's Brief. Finally, Petitioner's claim that a liberty interest would be violated if GRDA accurately published the allegedly false and defamatory statements of the OSBI is refuted herein.

> any criminal or otherwise stigmatizing conduct. *He also has not demonstrated defendants publicly embraced or asserted any false accusation as the cause of his discharge. Although Mr. Moorehouse has pointed to discussions within GRDA of the report that led to his suspension, those discussions were neither published nor the basis for any punitive action against the plaintiff.*

See, Petitioner's App., p. 5-6 (emphasis added to identify portions of the opinion omitted from discussion in Petitioner's Petition).

Petitioner inexplicitly misstates and ignores this clear, concise and material portion of the Tenth Circuit decision in its claim for certiorari. Petitioner argues that the Tenth Circuit:

> [W]rongly concluded that if a public employer accurately reports to the public a third party's false and defamatory statements about an employee and then terminates him, no liberty interest has been violated.

See, Petitioner's Brief, p. 9.

Petitioner's interpretation blatantly misstates the actual holding of the Tenth Circuit. Apparently, Petitioner is contending that the GRDA Board members published and divulged "charges" from the OSBI investigation report which were "false and defamatory"[7]. This contention ignores the Tenth Circuit's holding, and the truth, that "defendants made *no public statement accusing him* of any criminal or otherwise *stigmatizing conduct*" and ignores the Circuit's specific conclusion that Petitioner

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[7] Petitioner's statement that the "defendants" were the source of the allegedly stigmatizing newspaper articles is overbroad. Respondents Langley and Neftzger were the only Board members quoted in any of the articles.

did *not* demonstrate that defendants "publicly embraced or asserted any false accusation as the cause of his discharge".[8]

The Tenth Circuit found that the OSBI investigatory report was "neither published nor the basis for any punitive action against the plaintiff."[9] Thus, the Tenth Circuit did *not* determine, as claimed by Petitioner, that a public employer may report a third party's false and defamatory statement, because the Tenth Circuit specifically found that no false or defamatory statements *of anyone* were published.

The fact situation and issue which Petitioner wants this Court to review is *not* the fact situation or issue present in this case. The Tenth Circuit's analysis and decision of the facts and issues in this case is consistent with this Court's holding in *Bishop v. Wood* that the allegedly stigmatizing statement must be *published*, and with the holding in *Codd v. Velger* that the statement must be *false and stigmatizing*. Thus, there is no justification for the grant of certiorari.[10]

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[8] In fact, there is no evidence in the record before this Court or the lower courts that any of the information in the OSBI report was false.

[9] This holding distinguishes this case from *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), cited in Petitioner's Brief at p. 9. In *Owen*, the Court found the public employer *released to the public* defamatory and stigmatizing charges arising from a police investigation. Here, the Tenth Circuit specifically found that the information in the OSBI report, whether or not defamatory or stigmatizing, was neither published nor embraced in any public statements of the GRDA Board.

[10] Petitioner is also unable to satisfy the requirement that the alleged statements of Respondents were stigmatizing. The element of stigmatization requires proof that the GRDA fore-

B. Analysis of the Newspaper Articles

An examination of the allegedly stigmatizing publications – the newspaper articles – supports the Tenth Circuit's conclusions. (Aplt. App. at 73-75).[11]

The first article cited by Petitioner did not mention his name or identify him in any way, and thus could not have contained any false or stigmatizing information about him. (Aplt. App. at 74). It merely said that an OSBI investigatory report recommended nine cases for possible prosecution, without specifying either the charges or the individuals. Also, the first article was published *before Petitioner was suspended*, and thus could not have been tied to him. The other two articles state that Petitioner was "suspended with pay in connection with an Oklahoma State Bureau of Investigation probe of GRDA purchasing practices" and quote Neftzger as saying "The instruction I gave them . . . was they were suspended

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closed Petitioner's freedom to take advantage of other employment opportunities. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573-574, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The record reflects that Petitioner obtained other employment in Joplin, Missouri *while still suspended with pay by the GRDA* (Aplee. Supp. App. at 132-133), and, within nine months after his employment with GRDA ended, obtained employment as a superintendent with the City of Glendale, California, making more money than he did at GRDA. (Aplee. Supp. App. at 139-140). To the best of Respondents' knowledge, Petitioner has remained employed by the City of Glendale for over 4 years.

[11] It is noteworthy that Petitioner does not quote the allegedly stigmatizing statements from the newspaper articles in his Brief. One would think that if the statements were so stigmatizing as to violate Petitioner's liberty interests, Petitioner would want this Court to review them first-hand, rather than relying upon Petitioner's self-serving paraphrase and interpretation of the articles.

with pay and they were not to be on GRDA premises until we could finally dispose of this matter." (Aplt. App. at 73, 75). None of these statements were false. Petitioner *was* suspended in connection with the OSBI investigation and *was not* to be present on GRDA premises until the matter was concluded.

These articles do not establish that a false and stigmatizing statement was made by GRDA in connection with the "termination" of Petitioner, since several key elements are missing. First, Petitioner claims the false and stigmatizing information was contained in the OSBI report, but the articles do not indicate that GRDA published the report or disclosed any information from the report. In fact, Petitioner cannot point to any evidence in the record where information from the report was published by anyone. Second, the two GRDA officials who are quoted in the articles do not embrace or assert any accusation, false or otherwise, against Petitioner. Third, the Tenth Circuit found no evidence of duplicity in the official's statements. Finally, the statements were not made in connection with Petitioner's termination. The statements were made and the articles published in early December, 1987, over forty-five days prior to the alleged termination which occurred on February 1, 1988.[12]

C. The Tenth Circuit's Reliance Upon *Melton v. Oklahoma City*

Petitioner focuses his attack upon the Tenth Circuit holding in *Melton v. Oklahoma City*, 928 F.2d 920 (10th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 296 (1991), the

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[12] Incidentally, there was no publication outside the GRDA of such alleged termination on February 1, 1988.

opinion primarily relied upon by the Tenth Circuit in rendering its decision. Petitioner contends that *Melton* is also in conflict with this Court's rulings. Petitioner is again mistaken. The Circuit's reliance upon *Melton* does not warrant review because *Melton* is directly analogous to the facts of this case; was an *en banc* decision of the Tenth Circuit; and certiorari to this Court was sought and denied in *Melton*.

Moreover, the holding in *Melton* is not in conflict with decisions of this Court. In *Melton*, a public official published true statements that a police officer was terminated for violating the police code of ethics and was being investigated for perjury. The statements, like the statements of GRDA officials here, did not discuss the specific accusations against the officer, and the officer was never charged with perjury. The Tenth Circuit determined that the published statements were not false – the officer *was* terminated for violation of the ethics code – and did not constitute a violation of the officer's liberty interest. Since the Tenth Circuit's holding in this case is consistent with its holding in *Melton*, which is, in turn, consistent with this Court's holdings in *Bishop v. Wood* and *Codd v. Velger*, certiorari is not warranted, just as it was not warranted in *Melton*.

D. The Tenth Circuit Has Not Created a "Hiding Place" for Public Employers

Petitioner also argues that the Tenth Circuit decision will create a "hiding place" by allowing a public entity to "stigmatize an individual during the course of termination as long as it accurately states the content of the

stigmatizing information." Petitioner apparently contends the GRDA has wrongfully been allowed to publish stigmatizing information *from the OSBI report*.

This argument is misguided for several reasons. First, even if the Petitioner's characterization of the Tenth Circuit opinion and the facts of this case were accurate, there would still be no conflict between the Tenth Circuit and this Court because this Court held in *Codd v. Velger* that the published statement must not only be stigmatizing, *but also false*, before a liberty interest is violated. This holding is acknowledged in Petitioner's Brief. (Petitioner's Brief, p. 8-9). Furthermore, this Court required in *Codd v. Velger* that the *employer* be the source of the stigmatizing information before a name-clearing hearing is warranted:

> *Only if the employer creates and disseminates* a false and defamatory impression about the employee in connection with his termination is such a hearing required.

Codd v. Velger, 429 U.S. at 628 (emphasis added).

Thus, this Court has already determined that a public employer does not violate an employee's liberty interest if it accurately reports statements of a third party.

Second, Petitioner's characterization is, as previously noted, inaccurate. The Tenth Circuit specifically found that the information in the OSBI report, whether or not stigmatizing, *was never published* and was not the basis for any punitive action against Petitioner. The Tenth Circuit also found that defendants made *no public statement accusing Petitioner of criminal or otherwise stigmatizing conduct*, nor did they publicly embrace or assert *any* false accusation as the cause of his discharge. Moreover, the Tenth Circuit found no evidence of duplicity in the Respondents' statements. This also defeats Petitioner's argument

that the falsity element is met when there is a factual dispute between employer and employee. Petitioner's factual dispute, if one exists, is between Petitioner and the OSBI, not GRDA.

Finally, no "hiding place" has been created. The Tenth Circuit's decisions in *Melton* and in this case are both practical and supported by sound policy considerations. A public employer must be able to suspend, terminate and otherwise discipline employees when necessary in order to function in an efficient and orderly fashion. Since public agencies, such as GRDA, are charged with the public interest and subject to public scrutiny, they must also publicly explain the reasons for their employment decisions. Indeed, even though Oklahoma law allows a public agency to discuss personnel matters in a closed executive session, all actions of the agency must be voted upon in a regular session open to the public. *See*, Okla. Stat., tit. 25 § 307(E)(3). This is the reason the GRDA Board publicly announced on December 2, 1987 that Henry Neftzger was authorized to take the personnel action he deemed necessary as a result of the OSBI report. If a public employer must hold a name clearing hearing every time it is required to announce a personnel disciplinary decision, an unnecessary and overly burdensome chilling effect will be imposed on all agency personnel decisions.

Moreover, Petitioner's concern is unjustified. *Melton* provides the safeguards to prevent the "anomalous situation" of which Petitioner despairs. If a public employer publicly embraces false accusations of a third party as the cause of punitive action, or if a true statement is made by the agency with the intent to harm the subject's reputation, then, under *Melton*, a liberty interest is implicated.

Melton, 928 F.2d at 929, 930. It is ironic that *Melton*, the very case which Petitioner claims creates a potential for a harsh and anomalous result, provides the holding which prevents such a result.

Accordingly, the Tenth Circuit's decision adjudicating Petitioner's liberty interest claim in this case is *not* in conflict with the holdings of this Court, of any other court of appeals, or of the Oklahoma Supreme Court. The opinion does not raise any new or significant issues for this Court to decide and is not a departure from the accepted and usual course of judicial proceedings which necessitates this Court's supervision. The Circuit's decision not to publish its decision, the Circuit's decision to deny the Petition for Rehearing and Suggestion for Rehearing *en banc*, and this Court's denial of certiorari in *Melton*, are all strong indications that the Tenth Circuit's decision is supported by well-settled law. Although Petitioner may desire for this Court to review his misguided interpretation of the Circuit's decision and self-serving version of the record, *that is not the decision or record before this Court*. The Petition for Certiorari to review the Tenth Circuit's denial of Petitioner's liberty interest claim should be denied.

II.

THERE IS NO REASON TO GRANT CERTIORARI ON PETITIONER'S REJECTED PROPERTY INTEREST CLAIM

There is no reason to grant a writ of certiorari on Petitioner's property interest claim. Petitioner does not argue and cannot show a conflict between the Tenth Circuit's unpublished decision and the decision of another court of appeals or state court of last resort.

Instead, Petitioner argues that the Circuit's interpretation of Oklahoma law contained in the decision below is inconsistent with other Tenth Circuit opinions interpreting the law of the State of Oklahoma. In other words, Petitioner wants this Court to grant certiorari on an issue of state law because of a supposed conflict between various Tenth Circuit decisions – an alleged conflict *within* the Circuit.

A short answer to the Petitioner's argument is that it does not warrant a grant of certiorari. This Court should not waste its time settling supposed conflicts within a single court of appeals on a question of state law. Moreover, as shown herein, there is no conflict within the Tenth Circuit. The holding below is consistent with other decisions from the Tenth Circuit, as well as those of the Oklahoma Supreme Court.

A. The Question of Whether Petitioner had a Property Interest is a Question of State Law, and Not Appropriate for Certiorari

Petitioner challenges the Tenth Circuit's holding that he had no property right in continued employment. The existence of such a property right is determined by state law. *See Bishop v. Wood*, 426 U.S. 341, 344-45 (1976). Accordingly, the Oklahoma Supreme Court is the final arbiter in determining whether a property right exists under Oklahoma law. *See Id.*, 426 U.S. at 345. As a result, there is no reason for this Court to use its valuable time in deciding a question of state law.

B. No Conflict Exists Between the Decision Below and Decisions of the Oklahoma Supreme Court or the Tenth Circuit

In the case below, the Tenth Circuit correctly held that Petitioner had no property interest in his continued employment under Oklahoma law. The Circuit rejected Petitioner's argument that he had been led to believe he would have a permanent position, finding that it was "wholly without merit." The Circuit succinctly held:

> It is undisputed that Mr. Moorehouse was a nonclassified employee of GRDA. He attempted to avoid summary judgment on his claim of property deprivation by showing he had been led to believe he would have a permanent position, nonetheless. We have examined his arguments on this issue and conclude they are wholly without merit. This case is clearly governed by our prior holdings in *Dupree v. United Parcel Serv., Inc.*, 956 F.2d 219 (10th Cir. 1991); *Driggins v. Oklahoma City*, 954 F.2d 1511 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 129 (1992); and *Carnes v. Parker*, 922 F.2d 1506 (10th Cir. 1991).

Contrary to Petitioner's assertion, this holding is squarely in accord with the applicable decisions from the Tenth Circuit and Oklahoma Supreme Court. This is demonstrated by the authorities relied upon in the Tenth Circuit decision.

1. *The Driggins Holding*. One of these cases is *Driggins v. City of Oklahoma City*, 954 F.2d 1511, 1514 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 129. There, the Tenth Circuit held that a government official may not create a right to continued employment where there is a law, statute or other binding authority which explicitly states the terms

for dismissal from employment. *Id.* at 1514-15. In *Driggins*, the city charter gave no right to continued employment, stating that employees could be discharged "for the good of the service . . . " Based on this charter provision, the Tenth Circuit reasoned that government officials lacked the authority to alter the terms of the city charter by granting a right to continued employment when no such right existed in the charter.

In reaching its holding, the *Driggins* court relied upon an earlier Tenth Circuit opinion and a decision from the Oklahoma Supreme Court, specifically *Graham v. City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988), and *Umholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977). The *Driggins* decision also quoted from a Seventh Circuit opinion, stating:

> We hold, as the Seventh Circuit has held, that " 'mutually explicit understandings' that constitute property interests under the holding of *Perry* [*Perry v. Sindermann*, 408 U.S. 593 (1972)] cannot be based on the representations of government officials who are not authorized to make such representations." *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1334 (7th Cir. 1989) (citations omitted).

Driggins, 954 F.2d at 1515.

2. ***Driggins** is consistent with the Tenth Circuit Decision Below.* Petitioner argues that the Tenth Circuit's decision in the case at bar is inconsistent with its decision in *Driggins*. Even if Petitioner was correct, Petitioner would not be entitled to a writ of certiorari. The existence of inconsistent decisions within one court of appeals regarding a question of state law is a matter which should be addressed to the court of appeals by way of a petition for

rehearing and suggestion for rehearing en banc, but does not support the grant of certiorari.[13]

Moreover, Petitioner's claim that the Circuit's decisions in *Driggins* and the case at bar are inconsistent is nonsense. In each case, the court was faced with a similar situation. In both cases, there were governing documents which determined whether employees had a right to continued employment. In *Driggins* the governing document was a city charter; in this case, the governing documents were Oklahoma statutes and the Bylaws of GRDA. Because of the similarity between the two cases, as further shown herein, the Tenth Circuit correctly and consistently applied the rule in *Driggins* to the case at bar – that officials may not grant property rights not provided in the political subdivision's governing documents.

3. *GRDA's governing documents do not give Petitioner a property right to continued employment.* As noted, a part of GRDA's governing documents is a state law statutory framework which divides its employees into two groups – classified employees and unclassified employees. Classified employees are in most cases rank and file employees and are accorded protections regarding their discharge. Unclassified employees, on the other hand, are supervisors, administrative assistants and other employees, for whom the Oklahoma legislation does not provide these due process protections. *See* Okla. Stat. tit. 74, § 840.7, Aplee. Supp. App. at 29; and State of Oklahoma Merit

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[13] Apparently, no member of the Tenth Circuit Court of Appeals thought that the two decisions were inconsistent. Petitioner's petition for rehearing was denied by the panel that rendered the decision, and no member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc. (App. 7-8).

Rules, Ch. 1, p. 2, Aplee. Supp. App. at 30-93. The Oklahoma Merit System specifically defined Petitioner's position, as a GRDA supervisor, as unclassified. Okla. Stat. tit. 74, § 840.8(16).

Although Petitioner acknowledges the existence of this statutory framework, Petitioner failed to tell the court that GRDA expressly subjected itself to this framework. GRDA's Bylaws expressly provided that employees are to be hired "in accordance with the State of Oklahoma Merit System . . . " (See Bylaws, Article II, Section 6, Aplee. App. at 142). Once GRDA subjected itself to the Merit System, the rights of GRDA's employees to continued employment, if any, were derived from the Oklahoma Merit System. Under *Driggins*, no official had authority to alter the rights set forth in the governing documents.[14]

In his efforts to distinguish *Driggins*, Petitioner points to Okla. Stat. tit. 82, § 864, which permitted GRDA's Board of Directors to "appoint . . . employees", and "fix their . . . term of office and the method by which they may be removed." Petitioner argues that this statute permitted GRDA to ignore the *subsequently* adopted statutory framework which imposed the Oklahoma Merit System on GRDA and defined Petitioner's job as unclassified. Petitioner, however, not only fails to cite any authority for his proposition that the older statute

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[14] GRDA not only chose to subject itself to the Oklahoma Merit System and related Merit Rules for Employment in its Bylaws, it also chose to do so in its policy manual. (Aplee. Supp. App. at 94-128).

controls over the new one creating the Merit System,[15] but he also neglects to tell this Court that GRDA, through its Bylaws, chose to subject itself to the Merit System.

In a further effort to distinguish *Driggins*, Petitioner notes that GRDA Bylaws gave some of its highest ranking officials certain "procedural protections" regarding their discharge, such as the right to a hearing. (See Bylaws, Article V, Section 1, Aplee. App. at 146). No such procedural rights, however, were granted to unclassified employees in the position held by Petitioner, and in any event procedural protections are insufficient to create property rights.[16] *Id.* Thus, the Bylaws provide no help to Petitioner. Even considering this section of the Bylaws in connection with the statutory framework and other Bylaw provisions, Petitioner had no right to continued employment. The statutes and Bylaws, when read together, gave classified employees a property right to continued employment, gave certain procedural (non-

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[15] Moreover, Plaintiff's argument is inconsistent with Oklahoma's rules of statutory construction. *See, State, ex. rel. Murphy v. Boudreau*, 653 P.2d 531, 534 (Okla. 1982) (The court held that the most recent legislative expressions must be given effect over conflicting prior enactments and also that a special statute making a specific requirement controls over a general statute).

[16] Decisions from the Oklahoma Supreme Court and the Tenth Circuit show a concordance of opinion as to the standard required for creating a constitutionally protected property interest. Both courts recognize that there must be a "substantive restriction" on the employer's right to discharge an employee; procedural protections are insufficient. *See Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1502 (10th Cir. 1984); and *Blanton v. Housing Authority of the City of Norman*, 794 P.2d 412, 414-415 (Okla. 1990). The requirement of a substantive restriction has also been recognized by at least five other circuit courts. *See Asbill*, 726 F.2d at 1902, n. 2.

property) rights to certain unclassified employees,[17] and gave the remainder of the unclassified employees, such as Petitioner, no rights applicable here.

4. *Application of* ***Driggins*** *to Case at Bar.* This situation is no different than the facts of *Driggins*. There, the city charter in effect permitted discharge without cause, stating that " ' "removals and demotions shall be for the good of the service . . . " ' ". Here the Bylaws and statutes provided classified employees with a property right to continued employment, while leaving unclassified employees with no such protection. In this case and *Driggins*, the governing documents determined the existence of the right to continued employment.

Under *Driggins*, where this type of determination has been made – whether by statute, charter or bylaws – a government official may not undo that determination by offering greater protections than afforded by the governing documents. *See Driggins*, 954 F.2d at 1514-1515.[18]

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[17] *See* Note 16, *supra*.

[18] Moreover, there is another reason for rejecting Petitioner's request for certiorari. Even assuming *arguendo* that the rule announced in *Driggins* was not applicable here, and GRDA officials had the authority to make representations to Petitioner that could have provided him a property right in his continued employment, no such representations were made. The only representation referenced by Petitioner in his Petition was that he "had a job for the life of the power plant." This type of statement is nothing more than a "vague assurance," which is insufficient to create a property right. *See Dupree v. United Parcel Service, Inc.*, 956 F.2d 219, 222-223 (10th Cir. 1992). The Tenth Circuit expressly relied on *Dupree* in its decision below, and Petitioner does not challenge this ruling, or argue that it is inconsistent with Oklahoma law or with decisions from this Court or other circuit courts. As a result, even if this Court were to grant

The only possible distinction between *Driggins* and the case at bar is that the city charter in *Driggins* did not give property rights to any employees, while the statutes and Bylaws here gave property rights to some employees and gave no property rights to others such as Petitioner. This is a distinction without a difference.

The inconsequential nature of this factual distinction is shown by the Seventh Circuit's decision in *Wolf v. City of Fitchburg*, 870 F.2d 1327 (7th Cir. 1989). There, a Wisconsin statute permitted cities to give civil service protection to their employees, and the plaintiff argued that city officials had told her that she was entitled to those protections. The Seventh Circuit rejected this argument, stating (*id.* at 1334):

> We cannot accept Ms. Wolf's submission. It is now firmly established that the "mutually explicit understandings" that constitute property interests under the holding of *Perry* [*Perry v. Sindermann*] cannot be based on the representations of government officials who are not authorized to make such representations. . . . We believe that the district court was correct in holding that the representations made by city authorities to Ms. Wolf were unenforceable because they were *ultra vires*. The city never took appropriate legislative action to include the treasurer position [Wolf's position] within the civil service ordinance. (citations omitted).

The Tenth Circuit in *Driggins* cited *Wolf* with approval. *See* 954 F.2d at 1515.

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certiorari, there would be an independent basis not challenged by Petitioner for upholding the Tenth Circuit's decision in favor of Respondents. This independent basis is another reason for rejecting the requested writ.

Here, assuming as Petitioner argues, that Oklahoma statutes permitted GRDA to grant its employees property rights, GRDA's Bylaws did not do so. Under *Driggins* and *Wolf*, such a decision could not be undone by a GRDA official. Any statement purporting to place a substantive restriction on the discharge of unclassified employees such as Petitioner would be *ultra vires* and could not create a property right.

Thus, there is certainly no inconsistency between *Driggins*, *Wolf* and the case at bar. The fact that a statute may have *permitted* GRDA's Board of Directors to provide unclassified employees greater rights does not help Petitioner. GRDA's Board, through its Bylaws, chose not to grant any rights to those employees in Petitioner's position.

CONCLUSION AND REQUESTED RELIEF

There is no justification for this Court to review the Tenth Circuit's decision in this case. The Tenth Circuit's analysis of Petitioner's liberty interest claim is consistent with the mandates of this Court, and Petitioner has not alleged a conflict with any other circuit court of appeals or the Oklahoma Supreme Court. The Tenth Circuit expressly determined that GRDA did not publish any false or stigmatizing information concerning Petitioner, and did not embrace any false accusation against Petitioner. Petitioner's self-serving interpretation of the Tenth Circuit's decision and the record simply does not reflect the case before this Court, and does not warrant review.

The Tenth Circuit's ruling on Petitioner's property right claim also does not merit review. Petitioner has not alleged that the Tenth Circuit misapplied any decision of the Oklahoma Supreme Court, whose decisions govern

the determination whether Petitioner possessed a property right. At most, Petitioner incorrectly claims a conflict *within* the Tenth Circuit, an occurrence which, even if true, would not warrant consideration by this Court. Moreover, as shown *infra*, there was no such conflict.

In short, no significant questions are presented. The Tenth Circuit applied well established state and federal law. The Circuit's decision not to publish its order demonstrates that no new ground was broken. In addition, this Court has previously refused to grant certiorari in *Melton* and *Driggins*, two of the principal cases relied upon by the Tenth Circuit in its decision.

Respondents therefore request that this Court deny the Petition for Certiorari.

Respectfully submitted,

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